

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2014] EWCOP 12

Case No: 12452930

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 7 July 2014

Before:

Senior Judge Lush

Re AB (Revocation of Enduring Power of Attorney)

Between:

**THE PUBLIC GUARDIAN
- and -
MD (1)**

Applicant

WD (2)

THE LONDON BOROUGH OF BRENT (3)

Respondents

**Marion Bowgen for the The Public Guardian
MD and WD in person
Christine Cooper for the The London Borough of Brent**

Hearing date: 20 June 2014

JUDGMENT

Senior Judge Lush:

1. This is an application for the court to revoke an Enduring Power of Attorney ('EPA') on the ground that, having regard to all the circumstances, the attorneys are unsuitable to be the donor's attorneys.
2. In accordance with the President's guidance on the publication of judgments [2014] COPLR 78, unless there are compelling reasons why the judgment should not be published (which there are not in this case), I am required to publish a judgment arising from "any case where the issues include whether a person should be restrained from acting as an attorney or a deputy or that an appointment should be revoked or his or her powers reduced."
3. The attorneys are AB's nephews and I have anonymised this judgment in accordance with paragraph 20(iii) of the guidance, which says that, "anonymity in the judgment should not normally extend beyond the privacy of the adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so."

The family background

4. AB was born in County Cavan, Ireland, on 24 April 1928 and came to England when she was in her early thirties.
5. She was married briefly, but had no children.
6. She lives in a residential care home in Kingsbury, London NW9.
7. AB's sister-in-law, Maureen, is the widow of her brother, James. Maureen also lives in Kingsbury and has four sons (JD, MD, SD and WD) and one daughter (CL).
8. On 11 June 2007 AB signed an EPA, in which she appointed her nephews MD and WD jointly and severally to be her attorneys with general authority to act on her behalf in relation to all her property and affairs.
9. MD was born in 1962, is a plasterer, and lives in Kingsbury.
10. WD was born in 1964, is a quantity surveyor, and lives in West Yorkshire.
11. The EPA was drawn up by Hamilton Downing Quinn, Solicitors, Museum Street, London WC1.
12. AB has dementia.
13. Attorneys acting under an EPA have a duty to apply for the registration of the instrument if they have reason to believe that the donor is, or is becoming, mentally incapable of managing and administering their property and affairs. In August 2007 MD and WD applied to the Court of Protection (which was then the registration authority for powers of attorney) to register the EPA, and registration took place on 26 September 2007.

Property transactions

14. Until July 2006 AB lived in her own flat in Cricklewood, London NW2. Her family were concerned that she was becoming frail and forgetful, and decided that she should move in with her sister-in-law, Maureen, with whom she stayed until February 2007. WD and MD bought a flat nearby, known as 'The Lodge', with the intention that AB would live there. She moved into The Lodge in March 2007 and remained there for six months until September 2007. Her attorneys-cum-landlords, WD and MD, charged her rent and also required her to pay the costs of refurbishing The Lodge. In September 2007 she returned to live with Maureen, because by then she had become incapable of living independently. She stayed with Maureen until July 2008, when she was admitted into residential care.
15. Throughout this period the attorneys had let AB's flat in Cricklewood to a housing association, though it is unclear when they started to receive rent and into whose account it was paid. There were significant problems with the tenant and the flat was used for illegal activities involving drugs and firearms. The housing association eventually agreed to evict the tenant and surrender the lease. In April 2009 Bairstow Eves valued the property in the region of £230,000 and recommended marketing it at that price. In the event, the only offer received was for £200,000, and the attorneys agreed to sell the property to their sister, CL, for that sum. They sold it to her on 18 January 2010.

The application

16. On 24 January 2013 Brent Council wrote to the Office of the Public Guardian expressing its concern that AB's attorneys had not paid her residential care home fees, the arrears of which at that time stood at £23,334.
17. The Public Guardian opened a formal investigation into the matter, and sent a Court of Protection General Visitor, Sally Wexler, to see AB. It was not the most productive of visits, and in her report dated 27 June 2013 Sally Wexler said:

“The client appeared to have no knowledge of having signed any EPA. She became increasingly hostile as I attempted to question her further, responding to me with verbal aggression, swearing, screaming and spitting. Based on that presentation, I concluded that the client does not have the capacity to revoke or suspend the EPA.

During our brief interview, the donor did tell me that she “couldn't care less where I am.” She was under the impression that she still had her flat. She told me that she did not know how long she had lived at [the residential care home], at which point she let out a piercing scream, asked if I had any more stupid questions, and told me to go to hell.”

18. On 31 January 2014 the Public Guardian applied to the court for the following order:

“An order under Schedule 4 paragraph 16(4)(g) and sub-paragraph (5) of the Mental Capacity Act 2005 directing the revocation of the Enduring

Power of Attorney and directing the Public Guardian to cancel the registration of the Enduring Power of Attorney made by AB.

An order inviting the London Borough of Brent to seek to apply to become deputy in respect of the management of AB's property and affairs and given authority to take such steps as may be necessary to restore her finances to their correct level."

19. The application was accompanied by a witness statement dated 28 November 2013 and made by Imran Rasool, an investigations officer with the Office of the Public Guardian ('OPG'), who, after referring to the property transactions described in paragraphs 14 and 15 above, said:

- (a) On 9 February 2011 the attorneys had given £15,000 of AB's funds to their mother Maureen to purchase a car.
- (b) On 11 February 2011 the attorneys had made a loan of £10,000, and on 29 September 2011 had made a further loan of £40,000, from AB's funds to their brother SD to assist him in purchasing a new property whilst his current property was on the market.
- (c) The attorneys had failed to explain withdrawals from AB's funds totalling £60,020.68.

20. On 13 February 2014 and 24 April 2014 I made orders setting out a timetable for the parties to file and serve their evidence, and the application was listed for hearing on Friday 20 June 2014.

21. The attorneys filed a witness statement dated 14 May 2014, to which they appended some accounts, which they claimed had been signed off by their accountants, Goldblatts of London WC1. Their witness statement concluded as follows:

"In all the circumstances it is submitted that it is in AB's best interest to reject the application made to revoke the EPA and for the attorneys to continue to act under the authority of that EPA. The attorneys will be happy to submit annual accounts to the OPG and will if deemed appropriate by the court agree that they will not make financial decisions concerning financial sums in excess of a specified amount, say £5,000, without first seeking permission and approval from the OPG. If the court rejects this submission and is minded to revoke the EPA, it is submitted that an independent deputy be appointed and absolutely not the London Borough of Brent."

Christine Cooper's position statement

22. Christine Cooper is a barrister at Field Court Chambers and specialises in local government law. The London Borough of Brent instructed her to act for it in these proceedings and, in anticipation of the hearing on 20 June 2014, she filed a position statement in which she made the following submissions:

"The lengthy responses to the various questions raised by the Public Guardian provided by the attorneys show that AB's funds have been substantially dissipated. The purported accounts exhibited to the witness statement served on Brent on 3rd June 2014 are not signed off by an

accountant, as claimed in the body of the witness statement, and the underlying documents have never been disclosed. There are many assertions that solicitors and professional advisors were consulted before undertaking transactions but no details are provided and there is no such advice exhibited. Brent does not have any confidence in the figures provided.

What is clear, even on their own case, is that the attorneys treated AB's funds as their own private bank and doled them out to members of the family, until they reached the point where she was unable to pay for the care she needs. This was not in AB's best interest.

There are a number of transactions that, even on the respondents' own case, did not fall within their powers and were manifestly not in her best interest. These include the loans to SD, the purchase of a car for Maureen, the transfer of £15,000 to Maureen (when she already had free access to AB's post office account into which her pension was paid) and the draw-down of the unaccounted for £32,667.46 cash. There are, no doubt, other transactions that do not bear much scrutiny such as the alleged liability to pay for the refurbishment of The Lodge (with interest) when (i) it was owned by WD and MD, (ii) MD carried out the work himself, and (iii) she moved in as rent paying tenant.

Brent asks the court to find that these attorneys have not acted in AB's best interest and to revoke their powers of attorney. Brent does consider it is best placed to act as deputy for AB notwithstanding the attorney's opposition, as she is in a care home and it will have ongoing input in those arrangements. Whilst a panel deputy could be appointed, Brent is concerned that vast costs will be incurred in a professional deputy having to deal with lengthy correspondence and complaints from the displaced attorneys who the deputy will have to pursue to recover AB's funds. It is noted that AB has previously incurred a large legal bill of £22,874.74 from Hamilton Downing and it would not be in her best interest to incur further unnecessary expense.

Brent also asks for the court to make declarations in respect of those transactions that it considers to be outside the authority of the power of attorney and/or not in AB's best interest. This will make the process of recovering those funds somewhat simpler."

23. At the hearing Ms Cooper specifically sought declarations in respect of the following transactions being outside the scope of the attorneys' authority:
- (a) unaccounted for expenditure of £32,667.46;
 - (b) the transfer of £15,000 to Maureen; and
 - (c) the loans to the attorneys' brother, SD, totalling £50,000.

The law relating to the revocation of an EPA

24. The Public Guardian's application was for an order under paragraphs 16(4)(g) and 16(5) of Schedule 4 to the Mental Capacity Act 2005, which state as follows:

“16(4) The court must direct the Public Guardian to cancel the registration of an instrument registered under paragraph 13 in any of the following circumstances -

(a) – (f)

(g) on being satisfied that, having regard to all the circumstances and in particular the attorney’s relationship to or connection with the donor, the attorney is unsuitable to be the donor’s attorney.

16(5) If the court directs the Public Guardian to cancel the registration of an instrument on being satisfied of the matters specified in sub-paragraph (4)(f) or (g) it must by order revoke the power created by the instrument.”

25. The Law Commission briefly discussed the meaning of the expression ‘unsuitable to be the donor’s attorney’ in its report, *The Incapacitated Principal*, which was published in 1983 and led to the enactment of the Enduring Powers of Attorney Act in 1985. It said:

“This needs some explanation. It would amount in effect to a criticism of the donor’s choice of attorney. But we would not wish this ground to be sustained merely because the attorney was not the sort of person that a particular relative would have chosen. It is our wish that the donor’s choice of attorney should carry considerable weight. Thus, for example, a mother might be content to appoint her son as her EPA attorney despite being aware of a conviction for theft. We would not want her choice of attorney to be upset simply because a particular relative would not want the son to be his attorney. The question should be whether the particular attorney is suitable to act as attorney for the particular donor. In short, the court should examine carefully all the circumstances, particularly the relationship between the donor and the attorney.”

26. There was a string of reported decisions on the ‘unsuitability’ of attorneys some ten to fifteen years ago:

(a) *Re W (Enduring Power of Attorney)* [2000] 3 WLR 45, where the decision of the first instance judge was subsequently upheld by the Court of Appeal in *Re W (Enduring Power of Attorney)* [2001] 2 WLR 957;

(b) *Re E (Enduring Powers of Attorney)* [2000] 3 WLR 1974; and

(c) *Re F* [2004] 3 All ER 277.

27. All three cases involved disputes between siblings in their fifties or sixties over the management of their mother’s property and financial affairs, and this line of authorities culminated in the statement of Mr Justice Patten (as he then was) in *Re F*, [2004] 3 All ER 277, at page 284f:

“It seems to me that to remove a chosen attorney because of hostility from a sibling or other relative, in the absence of any effective challenge to his competence or integrity, should require clear evidence either that the continuing hostility will impede the proper administration of the estate or will cause significant distress to the donor which would be avoided by the appointment of a receiver. Neither of these conditions is satisfied by the evidence in this case.”

28. The criteria for revoking a Lasting Power of Attorney (LPA) are different from those for revoking an EPA. Subsections (3) and (4) of section 22 of the Mental Capacity Act 2005 provide that the court may revoke an LPA if (a) the donor lacks the capacity to revoke the LPA, and (b) the attorney has behaved or is behaving in a way that contravenes his authority or is not in the donor's best interest, or proposes to behave in such a way.
29. Generally speaking, any attorney acting under an EPA who has behaved, or is behaving, or proposes to behave, in a way that contravenes his authority or is not in the donor's best interests is likely to be unsuitable to be the donor's attorney, but the converse is not necessarily true. An attorney may be unsuitable to be the donor's attorney because the attorney has fallen out with them and no longer wishes them to act, even though their conduct as attorney has been exemplary.

Discussion

30. This is a case in which the attorneys have not only contravened their authority and behaved in a way that is not in the donor's best interests, but also there has been an effective challenge to their competence and integrity.
31. Like Brent Council and the Public Guardian, I have no confidence in the figures provided by the attorneys. There is no balance sheet and the full extent of AB's present assets and liabilities is unclear. For this reason, I must resist Miss Cooper's request for a declaration quantifying the extent of the loss to AB's estate caused by the attorneys.
32. Miss Cooper said that, as far as Brent is aware, AB's unpaid care fees are in the region of £49,000.
33. As far as AB's assets are concerned, it would appear that, in addition to cash of £32,667.46, various members of the family owe her an estimated sum of £59,989.19, and she owes various members of the family £38,243.06. The attorneys have calculated these amounts as follows:

	Owed to AB	Owed by AB
	£	£
Maureen	5,705.00	
CL - rent account		12,358.84
SD - loans and interest	52,582.08	
Cash account	32,667.46	
Amount due from WD	1,702.11	
Amount due to MD		2,300.00
Amount due to the family prior to the creation of the EPA		23,584.22
	<u>£92,656.65</u>	<u>£38,243.06</u>

34. The facts speak for themselves. Any attorney acting on behalf of a donor who is owed roughly £60,000 by members of her family, but has debts of approximately £49,000, has made a hash of managing and administering her finances.

35. There been an intermingling of funds, and the attorneys have consistently given priority to their own interests and those of other family members over the interests of AB. The property transactions are a good example. AB paid £7,215.65 for the refurbishment of a flat owned by the attorneys, in addition to paying rent and other outgoings on the property, but only lived there for six months.
36. The attorneys exceeded their authority in terms of the gifts they made. The accounts submitted by the attorneys show gifts totalling £7,040.31 and donations totalling £3,600.50 from September 2007 to March 2014. There are no details of the amounts, occasions or recipients, but when one considers that these gifts and donations were made over a period of six and a half years, I am prepared to concede that they may not have been unreasonable, having regard to all the circumstances.
37. However, on 9 February 2011 the attorneys made a gift of £15,000 of AB's funds to their mother, Maureen, to enable her to buy a car. On the following day she bought a Nissan Note 1.4 for £8,595. This gift exceeded the attorneys' authority under the Mental Capacity Act 2005, Schedule 4, paragraph 3(3) and, as Maureen was not financially dependent upon AB, it did not fall within the exception allowed in Schedule 4, paragraph 3(2).
38. The attorneys' reason for making the gift to purchase the vehicle was this:
- “We decided to purchase the high sided car because we were concerned that our mother was driving AB and fetching things for AB in an old, low seated car that was clearly not suitable to assist in our aunt's welfare or our mother's to stay well to provide support for our aunt. AB did go out in the new car; however it was not as often as we had hoped for two reasons. The first is because AB simply refused to go on trips. And when our mother and brothers persuaded her to attend family occasions at our mother's, AB simply refused to go back to the home. These were distressing moments for our mother particularly because she often commented on her own sense of 'guilt' that AB ended up in a care home.”
39. I do not believe this story and, even if it were true, it would be no justification for using AB's funds to buy Maureen a new vehicle. The attorneys should have known or anticipated that AB would refuse to go on trips or refuse to go home after family occasions. The car was acquired in February 2011. At that stage AB had been in a residential care home for two and a half years.
40. The Mental Capacity Act 2005 Code of Practice, paragraph 7.60 refers to the fiduciary duties of an attorney and says that:
- “A fiduciary duty means attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They must also not allow any other influences to affect the way in which they act as an attorney. Decisions should always benefit the donor, and not the attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the donor's expense.”

41. MD and WD have breached their fiduciary duties in several ways and in the circumstances I am satisfied that they are unsuitable to be AB's attorneys, and I shall revoke the EPA.

42. As far as the choice of deputy is concerned, the appointment of an independent professional deputy or panel deputy would be disproportionate. What is left of AB's estate would rapidly be eroded by the professional deputies' costs. I agree with Miss Cooper that Brent Council is best placed to act as deputy, as AB is in a residential care home and the Council is already funding the lion's share of her care fees.